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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. .....

COURT OF APPEALS NOS. 8421 AND 8422.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
Bankrupt,
Petitioner,

vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
THE PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

MARVIN L. GARDNER, Trustee in Bankruptcy of Arthur George Doethlaff, Bankrupt, respectfully petitioning, shows to the Court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This case was presented in the lower tribunals on an agreed statement of facts, which facts, concisely stated, are as follows:

Arthur George Doethlaff, hereinafter referred to as the bankrupt, on the 11th day of January 1924, entered into a contract with The Penn Mutual Life Insurance Company, hereinafter called the Insurance Company, whereby the said Insurance Company issued a certain policy of life insurance upon the life of the said bankrupt.

In the policy when issued, the beneficiary named in the policy was Herbert A. Jones a partner in business of the insured. In the policy there was reserved to the insured the right to change the beneficiaries at any time.

On January 10, 1927, the beneficiary in the said policy was changed to Bertha E. Doethlaff, wife of the bankrupt. On June 25th, 1937, the policy was again changed to make Bertha E. Doethlaff the beneficiary, if she survived the bankrupt-insured; but making Arthur G. Doethlaff, Jr., the son of the bankrupt-insured, the beneficiary provided he survived the bankrupt-insured and Bertha, the first named beneficiary. (It is to be noted that this second change of beneficiaries was within four months of the adjudication of bankruptcy of the said bankrupt.)

On September 3, 1937, the bankrupt filed his voluntary petition and was adjudicated bankrupt on the same day.

The Bankrupt was insolvent during the entire four years immediately preceding his bankruptcy, and during the said four year period made payment to the Insurance Company, as premiums on this policy, $428.49; and was credited by the company during said period with dividend accumulations amounting to $328.88 and accrued interest on dividends amounting to $119.18, making a gross amount

on the books of the Insurance Company to the credit of the bankrupt at the time of his adjudication, of $876.55. The cash surrender value of the policy, as of the date of the adjudication, was $1,286.36.

By the express terms of the policy issued to the bankrupt-insured, the right to change the beneficiary was reserved to the insured; and in the rider to the policy wherein the last change of beneficiary was made, is this express provision:

> "Prior to maturity the right to make further changes of beneficiary or assignments, to surrender or borrow upon the policy, and to exercise all privileges of ownership shall be vested only in the Insured."

B.

PROCEDURE IN, AND FINDINGS OF, THE LOWER TRIBUNALS.

The Trustee in bankruptcy filed his petition before the Honorable Wm. B. Woods, referee in bankruptcy, against the bankrupt and the insurance company, setting forth that the insurance policy in question had a cash surrender value of $1299.48; and praying that the sum of $895.10, being the amount of premiums, dividends and interest in the hands of the insurance company to the credit of the bankrupt, be ordered paid over to him, the said Trustee. The referee found in *favor of the Trustee* in bankruptcy, and filed a written opinion. (Record, pp. 24, 25.) The referee's order is on pp. 23, 24 of the Record.

The case was brought before the District Court of the United States, upon a petition for review filed on behalf of the bankrupt. The insurance company filed no petition for review and made no effort to obtain a review of the ruling of the referee. The *District Court affirmed* the order of the referee, handing down a written opinion. (Record, p. 29.)

The bankrupt then endeavored to perfect an appeal to the Circuit Court of Appeals for the Sixth Circuit, being case numbered 8421 on the dockets of said court, said appeal being ineffective because it was neither begun nor perfected within the time limited by law.

The insurance company, notwithstanding the fact that it had taken no appeal from the order of the referee, endeavored to take its separate appeal from the order of the District Court to the Circuit Court of Appeals for the Sixth Circuit, being case numbered 8422 on the dockets of the said court.

Both of these appeals, and the Trustee's separate motions to dismiss them because of lack of jurisdiction, were heard at one session of the said appellate court. The said court handed down its written opinion, *overruling* both of the Trustee's said motions and *reversing* the order of both of the lower tribunals. A copy of the said opinion is attached to the record of the proceedings in the Circuit Court of Appeals for the Sixth Circuit.

C.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. Section 347 (a), and 11 U. S. C. Section 47 (c)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered January 17, 1941, and filed January 21st, 1941, and is reported in 117 Fed. 2nd 582. The petitioner's petition for rehearing in that court was filed February 19, 1941, and was denied March 5, 1941.

D.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals for the Sixth Circuit, the following questions are presented for determination in the event that this petition for a writ of certiorari is granted.

1. Did the Circuit Court of Appeals for the Sixth Circuit have *jurisdiction* to hear and decide *either of the Appeals* attempted to be brought before it?

2. Did the Circuit Court of Appeals err in failing to search for and apply the *law of Ohio* to the facts in this case, under the mandate of *Erie Railroad vs. Tompkins,* and other cases?

3. Did the Circuit Court of Appeals err in holding that, where the terms of the policy reserved to the insured the right and power to *change the beneficiary* at will, that the beneficiaries had such a *vested interest* in the controversy as to require them to be made parties (when the settled law of Ohio is to the contrary)?

4. Did the Circuit Court of Appeals err in failing to find and to hold that the *power* of the bankrupt over the res in question passed to his Trustee under the *specific terms* of the Bankruptcy Act?

5. Did the Circuit Court of Appeals err in holding the fund in question could be *held as exempt* to the bankrupt, contrary to an *Ohio Statute* implemented by a recent decision of the *Supreme Court of Ohio,* exactly on the point?

Your petitioner contends that the said Court had *no jurisdiction* of these appeals whatever, and that said court's decision *was erroneous* in each of the other questions.

E.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Because the Circuit Court of Appeals for the Sixth Circuit heard and adjudged two cases over which it *had no jurisdiction,* as shown by the face of the record.

2. Because the said court *failed to search for* and apply the *law of Ohio.*

3. Because the said court reversed the lower tribunals for *lack of necessary parties,* when, by the settled law of Ohio, said parties were *neither necessary* nor *even proper* parties.

4. Because the said court disregarded *specific provisions of the Bankruptcy Act* as to property and *powers* which pass to a Trustee in Bankruptcy.

5. Because the said court passed over and disregarded the *exemption laws of Ohio.*

6. Because the decision of said court *is not supported* by the *cases cited by itself.*

7. Because the decision of the said court is *contrary to law,* as declared by decisions of this Court, and by the courts of Ohio.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket "Nos. 8421 and 8422, Marvin L. Gardner, Trustee, etc. v. Arthur George Doethlaff, Bankrupt, and The Penn Mutual Life Insurance Company"; that the judgment of said United States Circuit Court of Appeals in said causes be reversed

by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem just and proper.

SUGGS GARBER,
THEODORE E. SPILKA,
Attorneys for Petitioner.

HOWARD D. BURNETT,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM 1940.

No.....

COURT OF APPEALS NOS. 8421 AND 8422.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
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vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
THE PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

(Italics ours.)

OPINIONS OF THE LOWER TRIBUNALS.

The opinion and order of the Referee in Bankruptcy is printed in the Record, pp. 23, 24, 25, 26, 27, 28.

The order of the District Court of the United States is printed in the Record, p. 29.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is attached to the record of the proceedings in the Circuit Court of Appeals for the Sixth Circuit. Also it appears in 117 Fed. 2nd 582.

STATEMENT OF THE CASE.

This case was presented in the lower tribunals on an agreed statement of facts. A summary statement of these facts is given herein, *ante,* in connection with the Petition for a Writ of Certiorari, *ante,* page 2.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals for the Sixth Circuit erred in each of the following particulars:

1. In hearing, passing upon and reversing the decisions of the two lower tribunals, when the said court had *no jurisdiction whatever* over either of the appeals.

2. In failing *to search for* and apply the *law of Ohio,* which clearly supports the findings of the two lower tribunals, in *entire disregard* of the mandates of this Court in:

Erie Railroad Company v. Harry J. Tompkins (1938) 304 U. S. 64;

John G. Ruhlin et al. v. New York Life Insurance Company (1938) 304 U. S. 202;

West v. American Telephone & Telegraph Company (1940) 311 U. S. 223.

3. In holding that the changed *beneficiaries* in the insurance "had a *vital interest*" in the policy, and "should have been *made parties* defendant," both of which propositions are *contrary to established law in Ohio.*

4. In its construction of Ohio General Code, Section 9394, changing by interpretation "*paid in fraud* of creditors" to "*paid with intent* to delay, hinder and defraud them."

5. In holding that the District Court "was unauthorized to direct the premiums to be turned over out of the *cash surrender value* of the policy," when *no such order was made* by either the District Court or the Referee in Bankruptcy.

6. In holding that the lower tribunals were in error in ordering the "premiums, accumulated dividends and interest to be turned over" to the trustee, when, by the terms of the policy "all privileges of ownership, prior to maturity, were vested only in the Insured," and the Bankruptcy Act, then and now, vest in the Trustee "*powers* which he (the bankrupt) might have exercised for his own benefit."

7. In holding that "we are dealing with an *exemption statute*" which is entitled to a "*construction liberal* to the debtor," Ohio has stated by statute, and by a decision of the Supreme Court of Ohio, quoted *post*, that "exemption shall not be made by the debtor, or allowed to him from *money* * * * *due to him* * * * *from any corporation.*" The statute and decision of Ohio were called to the attention of the court by brief and argument, but they were entirely passed over in the Court's opinion.

8. In failing to hold that the sum of $113.35 (it having been paid to the Insurance Company on June 8, 1937, and the adjudication in bankruptcy having been made on September 3, 1937), belonged to the trustee under the terms of the Bankruptcy Act.

ARGUMENT ON ERRORS ASSIGNED.

1. THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAD NO JURISDICTION IN EITHER OF THESE APPEALS.

There were two separate appeals before the Circuit Court of Appeals in these cases. Case No. 8421 was the appeal of the Bankrupt, and Case No. 8422 was the separate appeal of the Insurance Company. The petitioner herein filed, in each case, a motion to dismiss the appeal on grounds hereinafter set forth. Although each of these motions to dismiss were accompanied by briefs in support thereof, the court postponed passing on these motions until the oral hearing of the appeals.

At the oral hearing at one session, the court heard argument on both of the appeals and on both of the motions to dismiss the appeals, and the court covered both of the appeals and both of the motions in one opinion, said opinion being printed, 117 Fed. 2nd 582, and also attached to the record as hereinbefore indicated.

The motion to dismiss the *appeal of the Bankrupt* (Case No. 8421) was based upon the fact that the so-called appeal was neither filed nor docketed in the Circuit Court of Appeals within the time required by law. In fact, it was not until *after* the time *limited* by law for perfecting an appeal to said Court, that the attorney for the bankrupt filed in said Court, an "Application to Appeal in Forma Pauperis," and said application was not acted on by said Court until October 10th, 1939. All of which matters were duly set forth in the Trustee's Motion to dismiss the appeal of the bankrupt, from which we excerpt the following statements:

> "Notice of appeal was filed June 1st, 1939. Thus, the case should have been docketed within forty (40) days from date of notice of appeal, namely, by *July 11th, 1939* (Rule 73 (g) of Civil Procedure). Rule 18 (United States Circuit Court of Appeals of the Sixth Circuit) provides that at time of filing the record the appellant shall deposit with the Clerk of Courts the sum of $45.00 as security for costs, except in certain cases, upon proper showing. But no costs were deposited in this case within the forty day period and no action was taken nor any Motion filed by the Appellant until *August 17th, 1939* (some five weeks later), when a Motion was filed by the appellant to prosecute an appeal in forma pauperis. This rule 18 further provides, that the Court may enlarge the time for the return *at* or *before* its *expiration date.* Rule 6 (b) (Civil Procedure) provides that the Court may order the period enlarged if application is made *before* the *expiration* of the period originally prescribed, or as extended by a previous order. Thus, failure by the appellant to take proper action within the forty days

allowed by law, namely, filing his application to proceed in forma pauperis, brings the appellant without the curative or enlargement provisions of the Rules of the Court and no enlargement may be granted by the Court at this late date to docket this cause under the effective Rules of Court, as promulgated and now in existence. As no excusable neglect was shown, this Court may not enlarge or extend the period of time herein and therefore this cause is *not* properly before this Court and should be dismissed."

The Motion to dismiss the appeal *of the Insurance Company* (Case No. 8422) was based upon the fact that it did not take an appeal from the order of the Referee in Bankruptcy but took a separate appeal, under a different case number, from the judgment of the District Court. In petitioner's reply brief, on this Motion to dismiss, was cited and commented on the following decision of this very Circuit Court of Appeals for the Sixth Circuit in which case the rule was declared that a party before the referee, not appealing to the District Court, could not appeal from the District Court's ruling, to said Court. At the time this appeal was attempted, General Order XXVII was effective.

International Agri. Corp. v. Cary, 38 A. B. R. 753, 240 Fed. 101 (C. C. A. Ohio, aff'g s.c. 38 A. B. R. 590, 243 Fed. 475, D. C.):

"General Order in Bankruptcy No. XXVII provides that when a person shall desire a review by the judge of any order made by the referee 'he shall file with the referee, his petition therefor, setting out the order complained of,' whereupon the proceedings shall be certified to the judge; and Rule No. 17 of the District Court below expressly provides that petitions for the review of orders made by the referee shall be filed with that officer 'within ten days from the entry of such order' with authority to the referee 'on written motion and upon good cause shown' to 'allow a longer time, not exceeding, however, five days.' Having failed to take such review, and order in question having been

within the referee's jurisdiction, appellant's right to complain of the order was effectually lost."

And this decision, unmodified, stood as the law at the time this appeal was attempted.

> "The bankrupt filed *no petition to review* the turnover order (General Order XXVII), and it was therefore an adjudication which may not be collaterally attacked that at the time it was made the appellee had possession of and was withholding the property. *There can no longer be any difference of judicial opinion upon the point.* (Citing cases, *inter alia,* 240 Fed. 101)."
>
> *Sarks v. Wells* (Jan. 17, 1930) 37 Fed. 2nd, 339, 340 (United States Circuit Court of Appeals, Sixth Circuit).

The foregoing facts are all set forth in the record in this case and are indisputable. Under said facts and the law appertaining thereto, the conclusion must inevitably be drawn that the Circuit Court of Appeals for the Sixth Circuit *never did have jurisdiction* over either of these appeals.

In the opinion handed down in these cases by said Court, all of these contentions were disposed of as follows, to-wit:

> "Appellee insists that the appeal of the insurance company should be dismissed because it *did not seek* a review of the referee's order. We *need not pass* upon the point further than to say that it is *immaterial.* The case *is before us* upon the *appeal of the bankrupt* and this is sufficient for a determination of the controversy."

It seems to us that this language of the court was used under a misapprehension of the facts. The case was *not before said Court* upon the *appeal of the bankrupt,* for the reasons given above.

If the so-called appeal of the bankrupt was void, there could be no right derived therefrom by the Insurance Com-

pany to argue its appeal. If the appeal of the Insurance Company was considered on its own merits, it should have failed under the former decision of this very Circuit Court quoted *supra,* to-wit, *International Agri. Corp. v. Cary.*

> "We cannot accept the conclusion of the (Sixth) Circuit Court of Appeals. It derives from an inadequate appraisal of the record."
>
> *Kloeb, Judge, v. Armour & Co.* (Dec. 9, 1940) 311 U. S. 119.

2. ERROR IN FAILING TO SEARCH FOR AND APPLY THE LAW OF OHIO.

In the case of *Erie Railroad Company v. Harry J. Tompkins* (1938), 304 U. S. 64, the Supreme Court of the United States reversed a precedent of almost one hundred years standing and declared that the Federal Courts are bound to follow in their decisions the *case law* of the State in which the action was originally brought.

The case of *Erie Railroad Company vs. Tompkins, supra,* was clarified and *extended* by a recent decision from which we excerpt the following:

> "The United States Circuit Court of Appeals, Sixth Circuit, reversed the decree of the District Court.
>
> "The Circuit Court of Appeals held that it was not bound to follow the decision of an intermediate Appellate Court of the state and that it was *free to adopt and apply* what it considered to be *better rule.*
>
> "The opinion of the court was delivered by Mr. Justice Stone and with regard to the applicability of the *Erie Railroad* case, he said:
>
> > 'A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest

> state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much it may have departed from prior decisions of the federal courts. * * * Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that it is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'
>
> "The judgment was accordingly *reversed.*"
>
> *West v. American Telephone & Telegraph Company* (December 9, 1940) 311 U. S. 223.

In the opinion of the Circuit Court of Appeals for the Sixth Circuit, the court after finding, we claim erroneously, that the case of *Lytle v. Baldinger* (1911) 84 O. S. 1, did not apply to the issue before it, makes this statement: "We are left therefore to *our own view of the law.*" It is to be noted that this is the same statement, in substance, made in *West v. American Telephone and Telegraph Company, supra,* and was the cause of the reversal in that case.

The rule laid down by this Court, for the application of the law of a State to the facts, which rule seems to have been disregarded by the Circuit Court of Appeals for the Sixth Circuit, in the case at bar, is as follows:

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins,* does not present the disputant with duties difficult or strange. The parties and the federal court must now *search for and apply* the entire body of *substantive law* governing an identical action in the *state courts.* Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments

of the state legislature. Now they must merely *broaden their inquiry* to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

John G. Ruhlin, et al., v. New York Life Insurance Company (1938), 304 U. S. 202.

3. ERROR IN HOLDING THAT THE BENEFICIARIES NAMED IN THE POLICIES WERE NECESSARY PARTIES IN THIS PROCEEDING.

The Circuit Court of Appeals for the Sixth Circuit used the following language in its opinion; 117 Fed. 2nd 582:

"The *beneficiaries* were not made parties defendant to the petition although it is clear enough that they had a *vital interest* adverse to the claim of the trustee and should have been made parties defendant."

The *law of Ohio,* on this point, is as follows:

"The right of a beneficiary in a contract of insurance which reserves to the insured the right to change the beneficiary from time to time, and which may be defeated by the insured by the designation of another beneficiary, or by nonpayment of dues, *does not become vested* until the happening of the event which matures the policy."

Oetting, Guardian, vs. Sparks (1933) 109 O. S. 94.

"A life insurance policy, which reserves to the insured the privilege of changing the beneficiary therein, gives the named beneficiary *only an expectancy* during the life of the insured, which does not become a vested right until the insured's death. (*Oetting, Gdn. v. Sparks,* 109 Ohio St., 94, second proposition of syllabus, approved and followed.)

"A majority of the cases hold that if a life insurance policy reserves to the insured the right to change the beneficiary, the beneficiary first designated *does*

not take a vested interest, but has *only an expectancy* during the life of the insured, contingent upon being the beneficiary at the time of the insured's death. 7 *Cooley's Briefs on Insurance* (2 Ed.), 6406; 2 *Couch, Cyclopedia of Insurance Law,* 825; 14 *Ruling Case Law,* 1376; 37 *Corpus Juris,* 579. *This is the rule adopted in Ohio. Oetting, Gd., v. Sparks,* 109 Ohio St., 94, 143 N. E. 184."

Katz v. Ohio National Bank, Exr. (1934) 127 O. S. 531, 533.

These two above cited decisions are the law of Ohio and the said Circuit Court was bound by the declaration thereunder, but apparently these decisions of the Supreme Court of Ohio were not given any consideration by said Court in its opinion.

The holding of the Circuit Court of Appeals for the Sixth Circuit on this point was made in entire disregard of the mandates of this Court in *Erie Railroad v. Tompkins, supra, Ruhlin vs. New York Life Insurance Co., supra,* and *West v. American Telegraph Co., supra.*

4. ERROR IN CHANGING BY INTERPRETATION THE WORDS "PAID IN FRAUD OF CREDITORS," TO "PAID WITH INTENT TO DELAY, HINDER AND DEFRAUD THEM."

The *courts of Ohio* have held in a line of cases, some of which are quoted and cited herein, constituting an unbroken current of authority extending over a great period of years, that a gift by an insolvent is *"constructively fraudulent"* as to his creditors. This is on the principle that a man must be just before he can be generous.

The serious result of this non-application of Ohio law is shown in the following excerpts from the opinion handed down by the United States Circuit Court of Appeals for the Sixth Circuit in this case, viz:

"The referee and the court based the order upon the view that the payment of premiums by the insured while insolvent was '*in fraud of creditors*' under Ohio General Code, Sec. 9394.

"We think its meaning is that creditors have a remedy where premiums have been paid *with intent* to delay, hinder and defraud them and that the *question of intent* is one of *ultimate fact* to be determined upon a consideration of the attending *facts and circumstances,* such as the question of the insolvency of the insured, his attitude toward his debts, the amounts thereof, his prospective ability to liquidate them, whether the policy was issued before or after insolvency, its cash surrender value; and finally, whether after all he, in good faith, intended to provide by moderate premiums some protection to those who had a natural claim upon his bounty."

The Circuit Court of Appeals for the Sixth Circuit, in its opinion, disposes of the Ohio Supreme Court decision in *Lytle v. Baldinger* (1911) 84 O. S. 1, a decision which was relied upon by both of the lower tribunals in this case, in the following language, to-wit:

"The case of *Lytle v. Baldinger,* 84 Ohio State 1, is cited as the nearest approach to an interpretation of the statute by an Ohio court but neither the present issues nor the statute were involved in the *Lytle* case. Nothing said in the *Lytle* case can be construed as an interpretation of the language 'in fraud of creditors.'

"*We are left* therefore *to our own view of the law.*"

We quote the following language from the opinion of the Supreme Court of Ohio in *Lytle v. Baldinger, supra,* construing the words "in fraud creditors" in Ohio General Code, Section 9394, to-wit:

"It would seem to be the policy of the law, not only to permit, but to encourage every husband to provide by insurance upon his life for the maintenance and support of his widow and children after his death. At the same time the law protects his creditors to the

extent of the funds actually diverted from his estate by reason of the procuring and keeping in effect such insurance. It would not appear that the creditor could be injured, delayed or defrauded *beyond the amount of money actually* expended *in the purchase of this insurance.* A debtor is under no legal obligation to insure his life for the benefit of his creditors. All that the law requires of him is that the property and means of which he is possessed, saving and excepting certain property exempt by law from execution, shall be honestly applied to the payment of his debts, and he is *not permitted* to give away that which in justice *belongs to his creditors.* So that when the law provides for the *return to his estate* of the money used *in the purchase of this insurance,* it gives to the creditor everything he is entitled to have, or could have reached by any process of law."

In *Lytle v. Baldinger, supra,* the policies had become vested in the wife and children by the death of the insured.

Syll.

"Where one, having creditors, transfers or conveys property representing virtually his entire estate, within three months prior to the filing of his petition in bankruptcy, for an appreciably inadequate consideration, an intent on his part to hinder, delay or defraud his creditors is thereby established within the provisions of Section 67e of the National Bankruptcy Act, Title 11, Section 107 (e), U. S. Code, and his trustee in bankruptcy is entitled to an avoidance of the transfer or conveyance."

Marlow, Trustee, Appellant v. Gillen, Appellee, 132 O. S. (1936) 102.

"If a man gives away his property without providing for his creditors, it is constructively fraudulent."

Union Central Life Insurance Co. v. Eckert (1878) 5 Ohio Decisions, Reprint, 452, 528.

5. ERROR IN FINDING AS TO "CASH SURRENDER VALUE" OF POLICY.

In the opinion of the Circuit Court of Appeals for the Sixth Circuit, we find this language, to-wit:

> "Moreover, the premiums to be returned to the trustee are to be paid by the insurance company out of the *cash surrender value* of the policy. We think that this was likewise erroneous. The statute is plain. The trustee can be paid only 'out of the proceeds of the contracts.' The contract is the policy and by its terms it can have no 'proceeds' until it matures, either by the death of the insured or as an endowment. It has not matured. The bankruptcy did not mature it. The statute does not undertake thus to rewrite the policy."

The above quoted language, in itself, is quite sufficient to show that the judge who wrote the opinion did not understand the facts, nor the claims made by the Trustee, nor the orders made by the lower tribunals.

No claim was made by any one that the policy had matured; nothing was claimed nor ordered paid out of the *cash surrender value* of the property; no claim was made by the Trustee, nor any payment ordered by the lower tribunals, out of the *"proceeds"* of the policy. The opinions of the Referee in Bankruptcy (Record, p. 24) and of the District Court (Record, p. 29), show that the Circuit Court of Appeals for the Sixth Circuit rendered its opinion without accurate knowledge as to what the claims of the Trustee herein actually were.

The claim of the Trustee was that certain sums were in the hands of the Insurance Company representing premiums, dividends and interest; that the bankrupt had *power*, by a change of beneficiary to make himself the beneficiary; and by the terms of the policy itself, the right to exercise all privileges of ownership in said policy. The claim of the Trustee is and was that the *powers* of the bankrupt passed to the Trustee by operation of law.

6. ERROR IN HOLDING "THAT THE PREMIUMS, ACCUMULATING DIVIDENDS AND INTEREST SHOULD NOT GO TO THE TRUSTEE."

On the face of the policy as issued, said policy being part of the record in this case (Record, pp. 7 *et seq.*), appears the following language, to-wit:

> "The right to *change the beneficiary* is reserved by the insured."
>
> "IV. CHANGE OF BENEFICIARY. Whenever the right to *change the beneficiary* has been reserved in the last designation of beneficiary recorded at the Home Office of the Company, the insured, * * * shall be entitled, *without* the *consent* of the *beneficiary*, to any cash dividends declared on this Policy and to the loan or cash value herein provided for, and *shall have full power* while this Policy is in force to *designate* a *new* beneficiary, with or without reserving the right of future designation, * * *."

And in the certificate (Record, pp. 7 *et seq.*) as to the last change of beneficiary is this language, to-wit:

> "Prior to maturity the right to make further *changes of beneficiary* or assignments, to surrender or borrow upon the policy, and to exercise all privileges of *ownership* shall be *vested* only in the *insured.*"

Bankruptcy Act, Par. 70, 11 U. S. C. A. 110, contains the following language, under the Amendatory Act of 1938, and which language, so far as quoted here, is identical with the language of the former act, to-wit:

> "The trustee of the estate of a bankrupt * * * shall be vested by operation of law with the title of the bankrupt, as of the date of the filing of the petition (old act said "date of adjudication") * * * to all * * * (3) *powers* which he might have exercised *for his own benefit*, but not those which he might have exercised solely for the benefit of some other person."
>
> "This Constitution, and the *Laws of the United States* which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the

Authority of the United States, shall be the *supreme Law of the Land.*"

United States Constitution, Article VI.

"A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, *becomes an asset,* to the extent of such value, in the trustee, under 70-a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representatives, if the bankrupt has reserved *absolute power to change the beneficiary* (237 Fed. 796 reversed).

"The question in the case is the simple one of the construction of Section 70-A.

"The declaration of subdivision 3 is about '*powers* which he might have exercised for his own benefit' 'shall in turn be vested in' the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true that the policies in question here are *not so payable,* but they *can or could have been* so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets, and, it might be, a *refuge for fraud.*"

Cohen, Trustee in Bankruptcy of Samuels v. Samuels (1917), 245 U. S. 50.

The case of *Cohen, Trustee v. Samuels, supra,* conclusively supports the claims of the trustee in the case at bar; is a decision of this Court, and under the doctrine of judicial subordination, was binding upon the Circuit Court of Appeals for the Sixth Circuit. Yet the said Circuit Court was content to dispose of the case at bar with the statement "We are left therefore to *our own view of the law.*"

And what authority does the Circuit Court of Appeals cite in support of its opinion? We quote from the opinion as published in 117 Fed. 2nd 582, 584.

> "See *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 S. Ct. 41, 32 L. Ed. 370; *Ross v. Minn. Mut. L. Ins. Co.*, 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46.
>
> "This view accords with the weight of authority (see Annotations under the *Ross* case, 31 A. L. R. 52); and *we are satisfied with it*. There is no evidence to indicate *any actual intention* upon the part of the insured to defraud his creditors by keeping up the payments of the premiums upon the policy even after he was insolvent."
>
> "Thus far in our history four Federal Bankruptcy laws have been passed. The law of 1800 was repealed in 1803. That of 1841 was repealed in 1843. That of 1867 was repealed in 1878. (*Central Bank of Washington v. Hume, supra*, was decided in 1888.) That of 1898 is still in force."
>
> *Black, Constitutional Law*, 3rd Ed. 261.

It is interesting to note that the learned court cites as its principal authority on a question in bankruptcy law, a case decided during the years when no federal bankruptcy act was in existence.

In *Bank v. Hume, supra*, the policy was a *straight life policy*; the action was by a creditor of the husband, to recover back premiums alleged to have been paid in fraud of creditors. The action was brought *after* the death of the husband, in the policy *no right* to *change* the *beneficiary was reserved* and there was no federal bankruptcy law in existence.

The case of *Bank v. Hume, supra*, therefore differs in *every material point*, from the case at bar. How the learned court came to regard that case as controlling, in the case at bar here, passeth all understanding.

"It is a general rule that a life insurance policy, and the money to become due under it, belong the moment it is issued to the person named in it as beneficiary, and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.

"A married man may rightfully devote a moderate portion of his earnings to insure his life, and thus make a reasonable provision for his family after his decease, without being thereby held to intend to hinder, delay or defraud his creditors, provided no such fraudulent intent is shown to exist, or must necessarily be inferred from the surrounding circumstances.

"In order to maintain an action on behalf of creditors of a deceased person against a life insurance company, to recover back premiums alleged to have been fraudulently paid by the decedent while insolvent to the company in order to make provisions for his wife and children, it must be alleged and proved that the company participated in the fraud."

Washington Central Bank v. Hume (1888) 128 U. S. 195.

"Under Bankruptcy Act July 1, 1898, C. 540, Par. 70a (5), 30 Stat. 505 (U. S. Comp. St. 1901, p. 3451) which provides that a trustee in bankruptcy shall be vested with the title of the bankrupt to all property which he could 'by any means have transferred' provided that, when any bankrupt shall have any insurance policy which shall have a cash surrender value payable to himself or his estate, he may pay such surrender value and retain the policy, the proviso does not limit and define what insurance policies shall pass to the trustee, but only excepts from property, which would otherwise pass to the trustee, insurance policies which have a surrender value, on payment to the trustee of such value. A policy which authorized the bankrupt to nominate or *change the beneficiary* at will is property which he might have 'transferred' and as such *passes under such section to his trustee,* unless

brought within the exception made by the proviso, although it is in terms payable to a designated beneficiary.

"Of the case of *Central North Bank v. Hume*, 128 U. S. 195, it is enough to say that the policies there in question *did not empower* the insured *to change the beneficiary*, but contained provisions *to the contrary*, as is shown by the statement preceding the opinion, which reads: 'It is a general rule that a life insurance policy and the money to become due under it, belong the moment it is issued to the person named in it as beneficiary, and that there is *no power* in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.' "

In re Orear (1910), 178 Fed. 638 (C. C. of A. Eighth Circuit (Mo.)).

Here appears a *clear conflict* between the decisions of two Circuit Courts of Appeals, the Sixth Circuit and the Eighth Circuit.

The case of *Ross vs. Minnesota Life Insurance* (1923) 154 Minn. 186, the other case relied on by the Circuit Court of Appeals for the Sixth Circuit to support its opinion, is substantially on the same state of facts as *Bank v. Hume, supra*, as is shown by the following excerpt from the *Ross* case:

This case involved a *straight life policy*. The premiums were paid by the insured while *insolvent*. On one policy, $696 had been paid as premium, and on the other $240.

The *insured died* and creditors claimed the premiums under this statute—to-wit:

"Whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against the creditors and representatives of the person effecting the same. All premiums paid for insurance in fraud of creditors, with interest thereon,

shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof in writing before payment.

Held. To maintain an action on behalf of the creditors of a deceased husband, to recover premiums paid by him while insolvent in order to provide for his family after his death, *fraud* must not only be *alleged* but *proved.*"

Ross v. Minnesota Mutual Life Ins. Co. (Jan. 5, 1923), 154 Minn. 186.

We respectfully suggest to this Court that the case of *Ross vs. Minnesota Life Insurance Co., supra,* no more supports the decision of the Circuit Court of Appeals for the Sixth Circuit than does the case of *Bank v. Hume, supra.*

The Circuit Court of Appeals for the Sixth Circuit, in support of its opinion, also cites 31 *A. L. R.* 51, 52. Annotation.

There is not a single Ohio case cited in that part of the annotation on which the court relied.

In fairness the court could further have commented on the *entire annotation,* particularly on page 55, where it is stated:

"There are a number of decisions which support the doctrine that the payment of premiums by an insolvent husband on his own life, for the benefit of his wife and children, or other relatives, *is fraudulent* as to his creditors, even in the *absence of actual fraudulent intent* on his part."

An *Ohio decision* is cited in support of the above paragraph in the annotation, from which *Ohio decision we excerpt the following*:

"A gift or payment of money as a premium for insurance on his life by a husband for the benefit of his wife, when in fact he is indebted beyond his means of payment, is constructively fraudulent as against creditors, under the 30th section of the act of 1872, the same as it would be under the statute of frauds."

Excerpt from the statute being construed is as follows:

"and a policy of insurance on the life of any person duly assigned, transferred or made payable to any married woman, whether such transfer, using the word transfer, be by her husband or other person, shall inure to her separate use and benefit and that of her children, independently of her husband's or their creditors, or of the person effecting or transferring the same, or his creditors. * * * provided, that if such policies are procured by any person *with intent to defraud* his creditors, an amount equal to the premiums paid on such policy or policies, with interest, shall inure to the benefit of such creditors, subject, however, to the statute of limitation.

It is *claimed here* that the policy must have been actually procured with the *intention of fraud.* That, on principles of law, I do not think is the case. The old statute of Elizabeth, providing for the setting aside of fraudulent conveyances, specifies those conveyances that are made with intent and purpose. It would seem that that would cover nothing but actual fraud. But the English Courts now hold that that covers *constructive fraud.* The same principle is determined in the case of *Jamison v. McNally,* 21 Ohio State Reports, where, under our assignment law, the making of a conveyance, if it is done with intent to defraud creditors, is declared fraudulent, yet if a man *gives away* his property without providing for his creditors, it is *constructively fraudulent.*"

Union Central Life Insurance Co. v. Eckert (1878), 5 O. D. Rep. 452 (Sup. Ct. of Cincinnati) (528).

This decision has never been modified or overruled in *any subsequent Ohio case.*

Thus it can be seen quite plainly that *the opinion* of the Circuit Court of Appeals for the Sixth Circuit is *not supported* by any of the authorities which *it cites itself.*

7. ERROR IN NOT APPLYING THE EXEMPTION LAWS OF OHIO.

CHAPTER III, Sec. 6. This Act shall not affect the allowance to bankrupts of the *exemptions* which are prescribed by the laws of the United States *or by the State laws* in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, * * *.

Federal Bankruptcy Act, 1938 Edition.

From the opinion of the Circuit Court of Appeals for the Sixth Circuit, we quote:

"We are left therefore to *our own view of the law* and it must be kept in mind that we are dealing with an *exemption statute* which is entitled to a construction *liberal to the debtor.*"

The law of Ohio, as to the *exemption of money* from claims of creditors, is as follows:

Ohio General Code 11738.

"Property Exempt from Levy. Husband and wife living together * * * and not the owner of a homestead, in lieu thereof, may hold exempt * * * real or personal property * * * *not exceeding five hundred dollars* in value, in addition to the amount of chattel property otherwise by law exempted. Such *selection* and *exemption shall not be made by the debtor,* or his attorney, or allowed to him from *money,* salary or wages *due to him* from any person, partnership or *corporation.* * * * (111 v. 383; R. S. #5441. Eff. July 21, 1925.)"

"The sole question presented in each of these cases is whether the fund involved falls within the provision of Section 11738, General Code, which precludes the allowance of exemption in lieu of homestead out of certain property therein specified.

"It is *contended on the one hand* that in the provision 'such selection and exemption shall not be made * * * from money, salary or wages due to him,' the phrase 'salary or wages' modifies or qualifies 'money,'

and that therefore money due the judgment debtor from any source, or of any character or class *other than 'salary or wages,'* and within the amount stated, may be held as exempt in lieu of homestead; or, to put it the other way, that 'salary or wages,' that is, personal earnings, due the judgment debtor, *is the only 'money'* due him which he may not select as exempt in lieu of homestead.

"The *other contention* is that the language employed *cannot be so construed* as to limit 'money due' to 'salary or wages,' and exclude money due the judgment debtor *from other sources* or other persons.

"In our opinion *the latter view is correct,* and is required by the simple and plain language of the statute, and that conclusion is supported by a review of the *legislative history* of this section and a consideration thereof in connection with Section 11725, General Code.

"In our opinion any test that may be applied requires that the phrase employed in Section 11738, General Code, be held to include *not only money due* the judgment debtor, as salary or wages, but money due him *from any* source."

The Morris Plan Bank vs. Viona, et al. (1930) 122 O. S. 28.

The Circuit Court of Appeals for the Sixth Circuit took *"its own view of the law."* It certainly did so in *entire disregard* of the mandates of this Court in *Erie Railroad v. Tompkins, supra*; *Ruhlin v. New York Life Insurance Co., supra*; and *West v. American Telegraph Co., supra.*

8. ERROR IN HOLDING THAT THE LAST PREMIUM PAYMENT TO THE INSURANCE COMPANY WAS THE PROPERTY OF THE BANKRUPT.

The record shows that the last payment of premium made to the Insurance Company of $113.35, was made June 8, 1937, and that the adjudication was on September 3, 1937.

"A person is insolvent when the present fair saleable value of his property is less than the amount required

to pay his debts." Bankruptcy Act, Sec. 67 (d) (1) (d).

"All conveyances, transfers, assignments * * * made or given by a person adjudged a bankrupt * * * within *four months* prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors * * * shall be *null and void* as against the creditors of such debtor * * * and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Bankruptcy Act 67 (e).

This payment was made to the Insurance Company during the admitted insolvency of the bankrupt, and during the *four month period* prior to bankruptcy, and therefore, under the Ohio rule, was constructively fraudulent.

Further, all of the moneys in question here *could be drawn,* under the terms of the policy by the bankrupt at any time prior to the adjudication, thus making the insurance policy a *"refuge for fraud,"* such as was condemned by this Court in *Cohen vs. Samuels, supra.*

At the time of this adjudication, the amendment of 1910 to the Bankruptcy Act Sec. 47 (a) (2), U. S. C. A. Title ii, Sec. 75, was effective. This section endows the trustee with the rights and remedies of a creditor *"armed with process." Remington,* Vol. 4, Sec. 1547.

The Circuit Court of Appeals for the Sixth Circuit has heretofore recognized the effect of the change made by the amendment in the following decision:

Potter Mfg. Co. v. Arthur, 220 Fed. 843, 34 A. B. R. 75 (C. C. A. Ohio):

"3. Under the rule of *York v. Cassell,* 15 A. B. R. 633, 201 U. S. 344, 50 L. ed. 782, 26 S. Ct. 481, *supra,* this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This *rule has been changed* by the amendment of June 25, 1910, to section 47a (2), U. S. C. title 11, § 75, providing that as to property 'in custody,' the trustee 'shall be

> deemed vested with all rights, remedies and *powers* of a creditor's *holding a lien* by legal or equitable proceedings'; and of course the nature and extent of these 'rights, remedies and powers' must be determined by the law of the State, where not inconsistent with the Bankruptcy Act."

In this case, the Trustee had a *lien upon all* of the money in the hands of the insurance company which the Bankrupt could himself draw; none of the said funds could be held exempt under the laws of Ohio, as shown *supra*. And still, under the decision of the Circuit Court of Appeals for the Sixth Circuit, the bankrupt can draw the funds in question and use them as he pleases, thus indeed making the insurance policy a refuge for fraud.

CONCLUSION.

We have endeavored to demonstrate, in the foregoing pages, that the Circuit Court of Appeals for the Sixth Circuit, in its opinion disposing of this case—

1. Has acted without having had jurisdiction over these appeals.
2. That said opinion is in conflict with a decision of the Eighth Circuit Court of Appeals on the same matter.
3. That said opinion is in conflict with decisions of Ohio courts on the same matter.
4. That said opinion is in conflict with a decision of this Court on some phases of this matter.
5. That this Court has not decided this question covering generally this field of law, and your opinion ought to be available to guide the administration of Estates in Bankruptcy Courts and in furtherance of orderly management and prompt disposition of Estate matters.

Your petitioner therefore respectfully urges that the prayer of its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in

the instant cases be granted, and that petitioner may have the relief prayed for in said petition.

All of which is respectfully submitted.

SUGGS GARBER,

THEODORE E. SPILKA,

Attorneys for Petitioner.

HOWARD D. BURNETT,

Of Counsel.

MAY 9 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1940.

Nos. 960 and 961.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
Bankrupt,
Petitioner,

vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

BRIEF OF RESPONDENT
PENN MUTUAL LIFE INSURANCE COMPANY
In Opposition to Petition for
Writ of Certiorari.

WALTER A. MARTING,
Union Commerce Bldg., Cleveland, Ohio,
Attorney for Respondent, Penn Mutual Life Insurance Company.

JONES, DAY, COCKLEY & REAVIS,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In Opposition to Petition for
Writ of Certiorari.

SUPPLEMENTAL STATEMENT OF THE CASE AND MATTERS INVOLVED.

Because the petitioner in his brief has failed to accurately state the facts and has not presented to the Court the matters involved, it becomes necessary for us to give a a short summary of the facts and the questions involved in these proceedings.

Arthur George Doethlaff filed a voluntary petition and was adjudicated a bankrupt on September 3, 1937. (R. 3.) During the entire four years immediately preceding the filing of the petition he had been unable to pay his debts in the ordinary course of his business and had been insolvent. (R. 4.)

The Bankrupt listed in his schedule of assets a $4,000 life insurance policy with The Penn Mutual Life Insurance Company. He maintained, however, in Schedule B-5 that this policy was exempt from the claim of the Trustee under Ohio General Code, Sec. 9394. (R. 4.) At the date the petition was filed the policy was payable to his wife if she survived him or if not to his son and if both predeceased him then to his estate. (R. 4.) The right to change the beneficiaries without their consent was retained by him. (R. 4.)

For the four years immediately preceding the filing of the petition the Bankrupt made premium payments on the policy in the total amount of $428.49. (R. 4.) The cash surrender value of the policy on the date of the petition was $1,286.36. (R. 4.) Included in this cash surrender value were dividend accumulations totaling $448.06 of which amount $328.88 represented actual dividends and $119.18 accrued interest thereon. (R. 5.) The Bankrupt adopted the option in the policy that the company retain the dividends and use the same to accelerate the maturity of the policy. (R. 6.) Accordingly these dividends were left to accumulate with the company and have not been withdrawn by the Bankrupt.

The Trustee filed with the Referee in Bankruptcy his amended petition and motion joining the Bankrupt and The Penn Mutual Life Insurance Company but not the beneficiaries of the policy. The Trustee maintained and both the Referee and the District Court held that the premium payments made by the Bankrupt in the four years preceding his voluntary petition in bankruptcy were payments made in fraud of creditors within the meaning of Ohio General Code, Section 9394 and should be paid over to the Trustee from the cash surrender value of the policy. (R. 24, 25, 29.)

In addition, the Referee and the District Court held that the dividends on the insurance policy and accrued in-

terest thereon were not exempt from the claims of the Trustee under the terms of Ohio General Code, Section 9394 and thus were to be paid over by the insurance company to the Trustee. (R. 24, 25, 29.)

Appeals were taken by both the Bankrupt and The Penn Mutual Life Insurance Company to the United States Circuit Court of Appeals for the Sixth Circuit. The facts of this case present the question of the proper interpretation of Ohio General Code, Section 9394, which is the Ohio statute exempting certain insurance policies from the claims of the insured's creditors.

The Circuit Court of Appeals for the Sixth Circuit held:

1. That the beneficiaries of an insurance policy are necessary parties to any action by an insured's creditors to recover allegedly fraudulently paid premiums and to recover the dividends of an insurance policy and accrued interest thereon under Ohio General Code, Section 9394.

2. That premiums paid by an insured husband on life insurance payable to his wife when he is insolvent are not paid in fraud of creditors within the meaning of Ohio General Code, Section 9394.

3. That, assuming that such premium payments are in fraud of creditors, the Trustee in Bankruptcy can not recover such from the cash surrender value of the policy but must wait until the policy matures.

4. That dividends on insurance policies and accrued interest thereon are exempt from the claims of the insured's creditors under Ohio General Code, Section 9394.

The Court further held that these matters were governed by Ohio General Code, Section 9394 but that there were no cases in Ohio passing upon the issues presented in regards to the proper interpretation of such section.

A further matter presented by the petitioner was that the appeals of the Bankrupt and the Insurance Company should be dismissed because of certain technical objections which will be discussed in full subsequently in this brief.

ARGUMENT.

The petitioner's reasons why certiorari should be granted in this case may be briefly summarized as follows:

1. The Circuit Court of Appeals committed gross error in its decision.

2. The Circuit Court of Appeals failed to search for and apply the law of Ohio to the matters presented in this case, namely, the interpretation of Ohio General Code, Section 9394.

3. That there is a conflict between the decision of this Circuit Court of Appeals and the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *In re Orear,* 178 Fed. 632.

Because this case primarily depends upon the interpretation of Ohio General Code, Section 9394, we are setting the same out in full:

> "Sec. 9394. (Exemption of proceeds from claims of creditors; exception; change of beneficiary.) All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature, and which have been or shall be taken out for the benefit of, or made payable, by change of beneficiary, transfer or assignment to, the wife or children, or any relative dependent upon such person, or any creditor, or to a trustee for the benefit of such wife, children, dependent relative or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free and clear from all claims of the creditors of such insured person or annuitants; provided, that, subject to the statute of limitations, the amount of any premium upon said contracts, endow-

ments or annuities paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid."

For purposes of clarity this portion of our brief will follow the same headings used by the petitioner in his brief.

"1. The Circuit Court of Appeals for the Sixth Circuit had no Jurisdiction in either of these Appeals."

The petitioner maintains that the Circuit Court of Appeals had no jurisdiction in the appeal of the Bankrupt for the reason that his appeal was not filed or docketed in the Circuit Court of Appeals within the time required by law.

The facts respecting the Bankrupt's appeal are as follows: On May 12, 1939 the District Court entered its judgment confirming the order of the Referee. On June 1, 1939 the Bankrupt filed his notice of appeal. On July 7, 1939, the transcript of record was filed with the United States Circuit Court of Appeals. The attorney for the Bankrupt did not deposit $45 for costs within the time required by the Rules of the Circuit Court of Appeals. However, the Bankrupt did file an application to proceed in *forma pauperis,* which was granted. This relieved the Bankrupt of the duty of depositing $45 for costs and permitted the Circuit Court of Appeals to docket the case.

The Federal Rules of Civil Procedure provide in Rule 73(a) as follows:

"Appeal to a Circuit Court of Appeals.

"(a) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of ap-

peals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Under the above rule the fact that the appellant did not file $45 for costs within the time set forth in the rules, can and does not affect the validity of his appeal. The petitioner maintains that under the rules of the Circuit Court of Appeals for the Sixth Circuit and under the Federal Rules of Civil Procedure, the Court may enlarge the time for docketing an appeal if such enlargement is granted prior to the expiration date. However, both of these rules refer to enlargement of the time for docketing an appeal by the *District Court*. Neither rule contains any restriction whatsoever on the Circuit Court of Appeals extending the time for docketing an appeal. Therefore, the Circuit Court was well within its rights in docketing the appeal of the Bankrupt. Needless to say, the fact that the Bankrupt could not deposit the $45 within the time required is, at the most, a very technical objection.

As respects the appeal of The Penn Mutual Life Insurance Company the Circuit Court correctly held that there was no need to pass upon its validity as long as the case was before it on the appeal of the Bankrupt. Both the appeal of the Bankrupt and the Insurance Company were from the same judgment and were based upon the same grounds.

The Trustee maintained that the appeal of the Insurance Company was invalid because the Insurance Company had failed to file a petition for review of the Referee's order with the District Court. The cases cited by the Trustee in support of this merely hold that if no petition for

review is filed to a Referee's order, such order becomes final and cannot be collaterally attacked. We have no argument with this rule. The fact is that the Bankrupt filed a petition for review of the Referee's order and thus gave the District Court jurisdiction to pass upon the Referee's order. Once the District Court had jurisdiction and, pursuant thereto, issued its order, the Insurance Company had a valid right to appeal to the Circuit Court of Appeals from such order. The cases cited by the petitioner clearly show that the petition for review is only necessary to give the District Court jurisdiction to pass upon the Referee's order.

"2. Error in Failing to Search for and Apply the Law of Ohio."

Petitioner cites on pages 15, 16 and 17 of his brief the latest cases of the Supreme Court which hold that the parties and the Federal Courts must search for and apply the substantive law governing an identical action in the state courts if the matter presented is one of state law. This is precisely what the Circuit Court of Appeals did in this case by holding that the issues presented were governed by O. G. C. Sec. 9394. However, as the Circuit Court stated, there are no cases in Ohio which have passed upon the matters presented in this case, namely, the proper interpretation of Ohio General Code, Section 9394. For this reason the Circuit Court was forced to determine what was the proper interpretation of such section.

"3. Error in Holding that the Beneficiaries Named in the Policies were Necessary Parties in this Proceeding."

The Circuit Court of Appeals stated that the beneficiaries of the policy should have been made parties because they had a vital interest adverse to the claim of the Trustee. The Circuit Court, however, did not reverse the case

on this point. There is no case in Ohio which passes upon this point one way or the other. All of the Ohio State Supreme Court cases cited by the petitioner merely hold that the beneficiary of an insurance policy, where the insured has reserved the right to change the beneficiary, does not have a vested right in such policy until the insured dies. With this proposition we entirely agree. However, the result of the Referee's and the District Court's order was to force the insured to surrender the policy, thus defeating the interests of the beneficiaries in the policy, which clearly affects their interest whether such is contingent or vested. The only case anywhere which we have been able to find passing upon this precise point is *In re Siegel* (U. S. D. C. S. D. N. Y., 1936) C. C. H. Bankruptcy Law Service, Decisions 1934-36, Par. 3967 which clearly supports the Circuit Court's decision.

"4. Error in Charge by Interpreting the Words 'Paid in Fraud of Creditors' to 'Paid with Intent to Delay, Hinder and Defraud Them.' "

The issue presented to the Circuit Court of Appeals was whether premium payments made by an insured when insolvent are in fraud of creditors within the meaning of Ohio General Code, Section 9394. The only evidence presented by the Trustee was that the insured was insolvent when he made premium payments totaling $428.29 over a four year period.

The Circuit Court held that there were no cases in Ohio passing upon the question of whether such premiums payments under those circumstances were in fraud of creditors within the meaning of Ohio General Code, Section 9394. The petitioner maintains that there are cases in Ohio passing upon this point and cites the case of *Lytle v. Baldinger*, 84 O. S. 1. The Syllabus of this case, which is the law in Ohio, reads as follows:

"1. A petition to set aside a fraudulent sale or transfer made in violation of the provisions of Section 6343, Revised Statutes, which does not aver that the person to whom the sale, conveyance, transfer, mortgage or assignment is made knew at the time of the transaction of the fraudulent intent on the part of the debtor does not state facts sufficient to constitute a cause of action.

"2. A transfer by an insolvent husband to his wife of a policy of insurance then in force on the life of the husband is not an assignment of property in fraud of creditors or to hinder or delay creditors within the contemplation of Section 6343, Revised Statutes.

"3. In such case the only remedy of the creditor is found in the provisions of Section 3628, Revised Statutes."

It is to be noted that this case involved the assignment of an insurance policy by a husband to his wife and whether such assignment was fraudulent or not because at the time of such assignment the husband was insolvent, the Court held that such assignment was not fraudulent. The Court held that the only remedy of the creditor was under the statute then in existence which is similar to Ohio General Code, Sec. 9394.

The next case cited by the petitioner is *Marlow, Trustee v. Gillen,* 132 O. S. 102. In this case the debtor, within three months of filing his petition in bankruptcy, conveyed all of his property which consisted of realty worth $3,000 to a third party for an actual consideration of $1250. The Court held that this conveyance was in fraud of creditors and that the Trustee under Section 67e of the National Bankruptcy Act could recover back the property because it was a fraudulent transfer within four months of the filing of the petition in bankruptcy. It is interesting to note that the Trustee has never cited this case until his present brief. Needless to say it is no authority one way or the other, for the question presented to the Circuit Court of Appeals.

The next case cited is *Union Central Life Insurance Co. v. Eckert,* (1878) 5 O. D. Rep. 528. This case was not cited to the Referee, to the District Court or to the Circuit Court of Appeals by the petitioner. This case dealt with a statute of Ohio which provided that insurance policies payable to the wife of the insured should be free from the claims of the insured's creditors "provided, however, that if such policies are procured by any person with intent to defraud his creditors, an amount equal to the premium paid on such policy or policies, with interest, shall inure to the benefit of said creditors * * *," (69 O. L. 159), which statute no longer is in effect in Ohio. This case involved the situation where a husband, while insolvent, took out a life insurance policy payable to his wife. This is a great deal different from the question presented in our case, because the insured bankrupt was not insolvent when the policy was taken out. He merely made certain premium payments after he had become insolvent.

The net effect of the Circuit Court's decision is that premiums paid by a husband for life insurance payable to his wife are not in fraud of creditors because of the mere fact that the husband is insolvent at the time of making the premium payments in the absence of other facts. There is no Ohio case respecting Ohio General Code, Section 9394, which passes upon this point one way or the other. None of the cases cited by petitioner have any bearing upon this issue. For this reason the Circuit Court of Appeals had to determine the question itself and decided that other evidence was necessary before it should be held as a matter of law that premiums paid by an insolvent husband were in fraud of creditors within the meaning of Ohio General Code, Section 9394.

"5. Error in Finding as to Cash Surrender Value of Policy."

For the first time the Trustee in Bankruptcy states that he is not interested in obtaining the so-called fraudulently paid premiums, dividends and interest thereon, from the cash surrender value of the policy. He states that his claim is that the powers of the Bankrupt as respects the insurance policy pass to him by operation of law. It is quite evident that the rights of the Trustee are governed by Ohio General Code, Section 9394. The insurance policy is exempt from the claims of the Trustee except such as are given to him by this section.

There are no funds on hand with the Insurance Company to the credit of the insured. As we will hereafter show, the dividends and accumulated interest thereon are exempt under Ohio General Code, Section 9394 and the Trustee only has a claim for the premiums paid during the past four years, if such premiums were paid in fraud of creditors. Under Ohio General Code, Section 9394 the Trustee can only receive these from the proceeds of the policy which means the amounts payable at the maturity of the policy as a death claim or the amounts payable if the policy is voluntarily surrendered by the insured.

In the Trustee's Amended Petition which was filed with the Referee, paragraph 3 reads:

> "3. Your Trustee further says that there is a cash surrender value of One Thousand Two Hundred Ninety-nine and 48/100 Dollars ($1,299.48), of which Four Hundred Fifty-seven and 97/100 Dollars ($457.97) rightfully belongs to your Trustee. That the above amount of money, the total sum of Four Hundred Fifty-seven and 97/100 Dollars ($457.97) was paid by the Bankrupt as premiums to the Penn Mutual Life Insurance Company while he was in the state of insolvency, continuously prior to the filing of the Petition herein by the Bankrupt."

The Referee, in holding for the Trustee, stated as one of the conclusions of the law (R. 24):

> "(1) That on motion for a show cause order directing payment of cash surrender value of life policy to trustee, because premiums were paid in fraud of creditors, premiums which have been paid while bankrupt was insolvent are to be regarded as fraudulent and so much of the cash surrender value and dividends as was traceable to those premiums with interest thereon is legally the property of the bankrupt estate."

The District Court confirmed the order of the Referee. It is clear from the above statements that the Trustee, the Referee and the District Court considered that the claims of the Trustee and the order of the Referee and District Court were that the so-called fraudulently paid premiums were to be paid out of the cash surrender value of the policy.

To say that the Circuit Court of Appeals rendered its opinion without accurate knowledge as to what the claims of the Trustee were is clearly contrary to the record of this case. We are pointing this out not because it is important but merely so that the Court will have the facts as shown by the record before it.

The Circuit Court held that under Ohio General Code, Section 9394, fraudulently paid premiums could only be recovered when the policy matured. The only Ohio case passing upon this point, which case supports the Circuit Court, is *Deal v. Menke*, 29 O. L. A. 181 (1939). The Circuit Court cited the case of *Greiman v. Metropolitan Life Insurance Co., et al.*, 96 F. (2d) 823 (C. C. A., 3, 1938) cert. den. 305 U. S. 606, which case is precisely in point on this issue.

"6. Error in Holding 'that the Premiums Accumulating Dividends and Interest should not go to the Trustee'."

We are somewhat at a loss to understand the position of the petitioner in this portion of his brief. The Trustee cites Section 70 of the Bankruptcy Act and the case of *Cohen, Trustee in Bankruptcy v. Samuels* (1917), 245 U. S. 50. It is obvious that neither this section nor the case have any bearing upon the issues presented here. It is clear that if Ohio did not have the exemption statute of Ohio General Code, Section 9394, the Trustee would be entitled to the full cash surrender value of the policy under both Section 70 of the Bankruptcy Act and the *Cohen* case above cited.

The Trustee's rights are governed entirely by Ohio General Code, Section 9394. The issue is whether the Trustee is entitled to the premiums paid when the bankrupt was insolvent. The Circuit Court of Appeals held that these premium payments were not in fraud of creditors within the meaning of Ohio General Code, Section 9394. In support of this proposition it cited *Central Bank of Washington v. Hume,* 128 U. S. 195 and *Ross v. Minneapolis Mutual Life Insurance Co.,* 154 Minn. 186, 191 N. W. 428, 31 A. L. R. 46. Both of these cases are precisely in point because they hold that an insured who is insolvent may devote a reasonable portion of his income to the payment of premiums on life insurance payable to his wife without such payments being in fraud of creditors.

The Petitioner next claims that the case of *In re Orear,* 178 Fed. 632, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit. At pages 25 and 26 of his brief, the petitioner purports to quote extensively from the Court's opinion in the *In re Orear* case at 178 Fed. 638. An analysis of this purported quotation shows that it actually is the Syllabus of the case combined with a portion of the opinion in the case at page 635, which por-

tion is further combined with a portion of the Syllabus of an entirely different case, namely *Central Bank of Washington v. Hume, supra.* This entire combination appears to be a quotation from the decision of the Court in the *In re Orear* case.

The case itself has no bearing upon the issues presented in our case. The *In re Orear* case merely held that where a bankrupt held an insurance policy in which he reserved the right to change the beneficiary, such passes under Section 70 of the Bankruptcy Act to the Trustee in Bankruptcy in spite of the fact that the insurance policies at the date of bankruptcy did not have a cash surrender value. The question of whether these policies were exempt under the Missouri exemption statute was not before the Court as is shown in the *Orear* decision at 178 Fed. 632 at 636, which reads:

> "Whether or not policy No. 656496, which is expressed therein to be for the benefit of the wife of the insured, is to be regarded as exempt under section 7895, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3749), and whether or not anything has occurred to avoid an exemption of the policy under that statute, are questions which were not in any manner presented before the referee or the District Court, and have not been presented in this court; so we leave them undecided."

Thus it is clear that the Court did not have the Missouri exemption statute before it. In addition, the question of fraudulently paid premiums was not presented in the case. The last case cited by the petitioner is *Union Central Life Insurance Co. v. Eckert,* 5 O. D. Rep. 528. We have heretofore discussed this case and shown that it had no bearing upon the issues presented in our case.

The Circuit Court further held that under Ohio General Code, Section 9394, the accumulated dividends and the accrued interest thereon were exempt from the claims of the Trustee. There are no cases in Ohio on this point one

way or the other. In support of its opinion the Circuit Court cited *In re Keil*, 88 F. (2d) 7 (C. C. A. 2, 1937), cert. den. 301 U. S. 708, which case is precisely in point on this issue.

"7. Error in not Applying the Exemption Laws of Ohio."

The discussion of the petitioner under this heading is both irrelevant and misleading for the reason that Ohio General Code, Section 11738, has nothing whatsoever to do with this case. The exemption statute which the Circuit Court of Appeals construed and which statute is the only one that has any bearing upon this case is Ohio General Code, Section 9394, which exempts certain insurance policies from the claims of the insured's creditors.

Ohio General Code, Section 11738, is that section of the Ohio General Code which exempts certain real and personal property of debtors from levy on execution where such debtor has no homestead property. Such section has nothing whatsoever to do with insurance policies. Neither the Bankrupt nor The Penn Mutual Life Insurance Company have claimed that this statute exempted the insurance policy from the claims of the Trustee in Bankruptcy.

"8. Error in Holding that the Last Premium Payment to the Insurance Company was the Property of the Bankrupt."

In this portion of the brief the Trustee claims that the last premium payment made on June 8, 1937 should be recovered under Section 67e of the Bankruptcy Act because it was made within four months prior to the bankruptcy. Nowhere in the briefs has this section been mentioned prior to this time and no mention of it was made in the oral argument before the Circuit Court of Appeals.

The petitioner in quoting Section 67e of the Bankruptcy Act, 11 U. S. C. A. 107(e), leaves out the following portion of said section:

"* * * except as to purchasers in good faith and for a present fair consideration; * * *."

There is no question that The Penn Mutual Life Insurance Company had no knowledge when it received the last premium payment whether the insured was insolvent or not. The Insurance Company clearly was a purchaser in good faith. It was required to accept this premium payment from the insured under the terms of the insurance policy. As consideration for the receipt of the premium payment, the Insurance Company maintained and kept in full force and effect the insurance policy until the next premium payment was due. In addition, dividends were allowed by the Insurance Company on this premium. A case clearly holding that in such situations insurance companies are purchasers in good faith is *Mutual Life Insurance Co. v. Smith* (C. C. A. Mass., 1911) 184 Fed. 1.

In addition, there is no evidence in the record to support the proposition that the insured paid this last premium payment with actual intent to defraud his creditors. Under the quoted portion of 67e of the Bankruptcy Act actual intent is required before the Trustee can set aside a transfer within four months of the petition being filed in bankruptcy.

On page 32 of his brief the petitioner maintains that he held a lien upon the money in the hands of the Insurance Company, which the Bankrupt himself could only withdraw. However, the rights of the Trustee in the insurance policy are governed and restricted by Ohio General Code, Section 9394. As we have heretofore shown and as the Circuit Court of Appeals held, the Trustee has no right or lien on any of the proceeds of this insurance policy.

CONCLUSION.

The only point in issue at this time is whether this Court should grant certiorari or not. Certiorari should not be granted in this case because:

1. The Circuit Court did not commit error in its decision.

2. The Circuit Court did follow the mandate of this Court that it should apply the law of Ohio, by applying Ohio General Code Section 9394. There being no cases in Ohio interpreting this section the Court was forced to determine the proper interpretation itself.

3. There is no conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and the decision of any other Circuit Court of Appeals. In fact the opinion of the Circuit Court of Appeals in this case is in complete conformity with two decisions of other Circuit Courts in both of which certiorari was denied, *Greiman v. Metropolitan Life Insurance Co., supra,* and *In re Keil, supra.*

Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER A. MARTING,

Attorney for Respondent, Penn Mutual Life Insurance Company.

JONES, DAY, COCKLEY & REAVIS,

Of Counsel.